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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 646.

UNITED STATES OF AMERICA,
Petitioner,

v.

RAY F. SPEERS,
Trustee in Bankruptcy of The Kurtz Roofing Company, f/d/b/a/ Kurtz Supply Company, Bankrupt,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

The Trustee in Bankruptcy of Kurtz Roofing Company opposes the petition for writ of certiorari filed herein because (1) This case was correctly decided by the United States Court of Appeals for the Sixth Circuit,[1] (2) Congressional action has been initiated to confirm the statutory construction which that court adopted and (3) The "administrative importance" of this issue is inconsequential inasmuch as the bankruptcy courts and their trustees are, in effect, a major collecting agency for the Internal Revenue Service.

[1] The court's opinion, written by Judge O'Sullivan, is reprinted at pages 9-16, Appendix to Petition for Certiorari.

COUNTER STATEMENT OF QUESTION PRESENTED.

Does the vested judicial lien of the bankruptcy trustee[2] have priority over a federal tax lien based only on assessment and non-payment of tax[3] without the filing of required statutory notice?[4]

The bankruptcy referee, the United States District Court and the United States Court of Appeals for the Sixth Circuit, have answered this question "Yes" and this is the correct answer.

The Court of Appeals opinion, 335 F. 2d 311 (August 4, 1964) concisely outlines the sound rationale of its conclusion, and recent congressional committee reports corroborate its interpretation of the original legislative intent.[5]

STATUTES INVOLVED.

Respondent agrees that the statutes for consideration on this petition are Section 70c. of the Bankruptcy act[6] and 26 U. S. C. Sections 6321 and 6323.

Section 67b. of the Bankruptcy Act[7] is not applicable for two reasons. First, this section simply removes late-filed tax liens from the category of voidable preferences. 4 *Collier on Bankruptcy* Sec. 67.24, p. 240. Second, the filing of notice in accordance with 26 U. S. C. Section 6323(a) is the significant fact in this regard, and the record does not disclose that such notice was ever filed.[8]

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[2] Section 70c. of the Bankruptcy Act, 11 U. S. C. Section 110(c).

[3] 26 U. S. C. Section 6321.

[4] 26 U. S. C. Section 6323(a).

[5] Sen. Rept. No. 1133, 88th Cong., 2nd Sess., p. 11; House Report No. 454, 88th Cong. 1st Sess., p. 10.

[6] 11 U. S. C. Section 110(c).

[7] 11 U. S. C. Section 107(b).

[8] Pet. for Cert., App., p. 16.

STATEMENT.

On June 20, 1960, Kurtz Roofing Company filed its voluntary petition in bankruptcy and was adjudicated bankrupt on the same day. Sale of its assets produced only $17,680. After payment of secured claims, expenses of sale and costs of administration, the balance remaining was insufficient to pay claims other than priority tax claims. The dividend on these was 53.48%, or $11,127.61.

Distribution proposed was $9,202.35 on the federal tax claim and $1,925.26 on state and local tax claims. R. 9a. Liquidation sales expense had been paid as an expense of bankruptcy administration.[9]

The failure, prior to the date of bankruptcy, to file the statutory notice called for by 26 U. S. C. Section 6323(a) is the primary fact raising the legal issue on this appeal. The trustee contends that without such notice, the government tax lien under 26 U. S. C. Section 6321 is subordinate to the trustee's rights created by Section 70c. of the Bankruptcy Act.[10]

The government contends that despite the secret nature of the tax lien before notice is filed, a trustee in bankruptcy is not a "judgment creditor" such that this secret lien is invalid as to him. It admits that a trustee in bankruptcy has been granted *some* of the rights of a judgment creditor but rejects the statutory recitation that a trustee shall have "all" such rights.[11]

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[9] Auctioneers commissions and expenses, rent and storage expenses alone amounted to $2,196.28. R. 8a.

[10] 11 U. S. C. Section 110(c).

[11] Court of Appeals, Opinion, Pet. for Cert., App., p. 12.

REASONS FOR DENYING CERTIORARI.

1. This case was correctly decided by the Court of Appeals for the Sixth Circuit. The court's opinion was written by Judge O'Sullivan[12] and carefully presents the controlling reasons supporting its conclusion. That court relied on the unambiguous language of the two federal statutes involved. 26 U. S. C. Section 6323(a) makes special concessions in favor of a judgment creditor, and Section 70c. of the Bankruptcy Act, 11 U. S. C. Section 110(c) vests in a bankruptcy trustee all the legal rights of a broad category of creditors which includes a judgment creditor. From this, it concluded that Congress intended a trustee in bankruptcy to have all of the rights of a judgment creditor.

The appellate court's opinion says, "We think that Judge Hamley spoke correctly in stating, 'In my view this statute [§ 70(c)] states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one.' " [13]

Language is the "dependable guide" to statutory meaning. *Simonson, Trustee v. Granquist, District Director,* 369 U. S. 38, 40 (1962). "First reference is * * * to the literal meaning of the word employed" [*Flora v. United States,* 357 U. S. 63, 65 (1958)], and statutes are to be applied "on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Ry. Co.,* 343 U. S. 562, 575 (1952).

The Court of Appeals properly analyzed this Court's decision in *United States v. Gilbert Associates, Inc.,* 345 U. S. 361, 363-364 (1953). The municipal tax creditor there involved did not have specific Congressional grant of

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[12] Pet. for Cert., App., p. 15.

[13] *Simonson v. Granquist,* 287 F. 2d 489, 491 (9 Cir. 1961).

the rights of a judicial lien creditor as does a bankruptcy trustee. *Myers, Trustee v. Matley*, 318 U. S. 622, 627 (1943).

The correctness of this Sixth Circuit decision will stand out clearly in a comparison of its reasoning and analysis of authority with that of the majority opinion in the case of *In re Fidelity Tube Corp.*, 278 F. 2d 776 (3 Cir. 1960), cert. den. 364 U. S. 828.

2. Congress is taking steps to resolve any court conflicts on this question, and, as petitioner suggests, this, rather than further court decisions,[14] might be the only solution. However, we believe petitioner has misinterpreted the significance of Senate Report No. 1133, 88th Congress, 2nd Session.[15] This document restates the legis-

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[14] Government appeals have changed this case from a bankruptcy referee's ruling in a single division to a Court of Appeals judgment for an entire appellate circuit.

[15] At page 11, this report says:

"The effect of these decisions is that the Federal Government's unrecorded tax lien prevails over the rights of the trustee under section 70c. *This would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial lien creditor.* Prior to 1950, the trustee was given the status of a judicial lien creditor as to all property coming into the possession of the bankruptcy court. As to all other property, he was given the rights of a judgment creditor holding an execution returned unsatisfied. In 1950, the distinction which turned on possession was eliminated and the trustee was simply given the rights of a judicial lien creditor. The House report which accompanied the bill indicates that the purpose of Congress was not to contract but rather to expand the rights of the trustee under section 70c. The report states that the amendment to section 70c—'has been placed in the bill for the protection of trustees in bankruptcy as correlative to the amendment to section 60, and also to simplify, and to some extent expand, the general expression of the rights of trustees in bankruptcy (H. Rept. 1293, 81st Cong., 2d sess., p. 7 (1949)).'

As a matter of general law, the holder of a lien by legal proceedings has greater rights than a judgment creditor who usually has no rights in the personal property of the debtor by virtue

(Continued on following page)

lative intent that a bankruptcy trustee shall have all the rights of a judgment creditor. It gives clear indication that Congress will resolve this issue and will confirm the position of the Sixth Circuit Court of Appeals in this case.[16]

3. In referring to "administrative importance," petitioner overlooks some practical considerations. Statistical

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(Continued from preceding page)

of his judgment. Even as to real property it is frequently necessary for the judgment creditor to take further action after judgment to create a lien. It would seem anomalous to allow judgment creditors to prevail over secret tax liens and to deny that right to a judicial lien holder. As against liens and transfers other than Federal tax liens, it has generally been held that a trustee in bankruptcy does have the rights of a judgment creditor. See, e.g., *McKay v. Trusco Finance Co.* (198 F. 2d 431 (5th Cir. 1952)); *Sampsell v. Straub* (194 F. 2d 228 (9th Cir. 1951)); cert. denied, 343 U. S. 927 (1952).

The need for forthright congressional action in this matter was underscored by the decision in *Fidelity Tube, supra.* There the court pointed to the fact that legislation clarifying the status of the judgment creditor was pending before Congress and further declared that it considered the enactment of such legislation necessary if the trustee was to have the status of a judgment creditor vis-a-vis the Federal tax lien.

In order to assure the trustee of this status, section 6 of H. R. 394, as reported, specifically provides that a trustee shall have the rights and powers of 'a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists." (Emphasis added.)

[16] House Report No. 454, 88th Cong. 1st Session (to accompany H. R. 394), p. 10, also expresses the opinion that the effect of *In re Fidelity Tube Corp., supra,* "would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial creditor."

H. R. 394 provided: "The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, * * *." It was passed by the House of Representatives on July 8, 1963. Although reported favorably by the Senate Judiciary Committee in June, 1964, it was recommitted to the Senate Finance Committee and no further action was taken by the Senate.

records of the United States Courts[17] establish that, annually, only 20% of the total bankruptcy proceedings are filed in the Sixth Circuit.[18] Thus, on the basis of this percentage, this case is concerned with only about 80 of the 400 federal tax lien situations which petitioner claims to be significant.

These statistics disclose that in 1963 bankruptcy courts paid $9,283,454 in priority tax claims. This amounted to 68% of all priority distributions.[19] Applying this same percentage to priority distributions for the two prior years, tax claim payments by bankruptcy trustees can be estimated at $6,670,000 in 1962 and $7,180,000 in 1961.[20]

Three conclusions are suggested. The interests of the government and the bankruptcy trustees are not truly adverse. Bankruptcy trustees are important tax collectors for federal, state and local governments. And, in many cases, tax claims are collected and paid in full from bankrupt estates without reduction for expenses of administration or sale.

If "administrative importance" is relevant to the petition for certiorari, it is appropriate to note that the extensive rights granted to bankruptcy trustees by Section 70c. of the Bankruptcy Act benefit priority tax claimants as well as all others who are entitled to distributions from bankrupt estates.

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[17] Tables of Bankruptcy Statistics for the Fiscal Years Ending 1961, 1962 and 1963, prepared in accordance with Section 53 of the Bankruptcy Act by the Administrative Office of the United States Courts.

[18] Id. 1963, p. 4, Table F 2; id. 1962, pp. 1, 3.

[19] Id. 1963, Table F 5.

[20] Id. 1962, Table F 6; id. 1961, Table F 6.

CONCLUSION.

The decision of the Court of Appeals for the Sixth Circuit was correct.

The question posed by petitioner will probably soon be answered (in agreement with the Sixth Circuit decision) by Congressional action. No "administrative importance" warrants determination by this Court prior to such legislation.

The petition for certiorari should be denied.

Respectfully submitted,

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